No. 95-8836

In The

Supreme Court of the United States

October Term, 1995

ELLIS WAYNE FELKER,

Petitioner,

v.

TONY TURPIN, Warden,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTIONS PRESENTED

(1) Whether Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 (the Act), and in particular Section 106(b)(3)(E), 28 U.S.C. § 2244(b)(3)(E), is an unconstitutional restriction of the jurisdiction of this Court.

(2) Whether and to what extent the provisions of Title I of the Act apply to petitions for habeas corpus filed as original matters in this Court pursuant to 28 U.S.C. § 2241.

(3) Whether application of the Act in this case is a suspension of the writ of habeas corpus in violation of Art. I, § 9, clause 2 of the Constitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES & CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES – Continued

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is not yet reported. *Felker v. Turpin*, No. 96-1077, ___ F.3d ___ (11th Cir. May 2, 1996).

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's motion for permission to file a habeas corpus petition in the district court was entered on May 2, 1996. This Court granted review on May 3, 1996. This Court has jurisdiction to entertain this matter under 28 U.S.C. §§ 2241, 2254(a) and 1651.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Article I, section 9, clause 2 of the Constitution provides as follows:

> "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

Article III, section 2, clause 2 provides in relevant part:

> "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

The Eighth Amendment provides in relevant part:

> "[N]or [shall] cruel and unusual punishments [be] inflicted;

The Fourteenth Amendment provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . . "

28 U.S.C. § 2241 provides in relevant part:

> "(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions."
>
> "(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it."

28 U.S.C. § 2244(b) provides in relevant part:

> "(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> "(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –
>
> > "(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

> > "(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> >
> > "(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.
>
> "(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> "(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
>
> "(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
>
> "(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
>
> "(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

"(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section."

STATEMENT OF THE CASE

Section 106(b)(3)(E) of the Anti-Terrorism and Effective Death Penalty Act of 1996 ["the Act"], amends 28 U.S.C. § 2244(b).[1] Section 2244(b) deals with second or successive federal habeas corpus applications filed by persons held in custody pursuant to a judgment of a state court. The new Act makes two changes from prior law:

First. The Act establishes new substantive requirements for second or successive applications. Section

[1] Prior to its amendment, section 2244 provided:

(b) When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

2244(b)(1) provides that an application raising a claim that had been presented in a prior petition "shall be dismissed." Section 2244(b)(2) provides that second or successive habeas petitions raising new claims also must be dismissed, unless the application satisfies certain prescribed standards.[2]

Second. The Act establishes a procedure that must be followed "[b]efore a second or successive application permitted by this section is filed in the district court." 28 U.S.C. § 2244(b)(3)(A). A prisoner who wishes to file such a petition in the district court must first move the court of appeals for "an order authorizing the district court to consider" the petition. *Id.* That motion must be "determined by a three-judge panel of the court of appeals," which shall issue an order "only if it determines that the

[2] Section 2244(b)(2) now provides:

"A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

"(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

"(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

"(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

application makes a prima facie showing that the application satisfies the requirements of [subsection (b)(2)]." *Id.* § 2244(b)(3)(B) and (C).

The final feature of the new procedure is the focus of the present case. Under amended § 2244(b)(3)(E), the court of appeals' decision either to grant or to deny the prisoner's motion "shall not be appealable and shall not be the subject of a petition for rehearing *or for a writ of certiorari*" (emphasis supplied).

The petitioner, Ellis Wayne Felker, moved the court of appeals for an order authorizing him to file a second or successive petition in the district court.[3] The three-judge panel assigned to the case denied that motion. *Felker v. Turpin*, No. 96-1077 (11th Cir. May 2, 1996). Finding himself barred from filing a petition in the district court, Mr. Felker sought this Court's appellate review of the panel's decision. In doing so, he invoked the Court's jurisdiction pursuant to 28 U.S.C. §§ 2241 and 1651.

On May 3, 1996, this Court ordered the parties to submit briefs "limited to the following questions:"

> (1) Whether Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 (the Act), and in particular Section 106(b)(3)(E), 28 U.S.C. § 2244(b)(3)(E), is an unconstitutional restriction of the jurisdiction of this Court.
>
> (2) Whether and to what extent the provisions of Title I of the Act apply to petitions for

[3] This motion was filed on May 1, 1996, one week after the President signed the new act into law on April 24, 1996.

> habeas corpus filed as original matters in this Court pursuant to 28 U.S.C. § 2241.
>
> (3) Whether application of the Act in this case is a suspension of the writ of habeas corpus in violation of Art. I, § 9, clause 2 of the Constitution.

SUMMARY OF ARGUMENT

Question (2) is essentially one of statutory construction. We address it first for that reason and because the manner of its resolution has important implications for the constitutional issues raised.[4]

Point I argues that the Act does not remotely purport to interfere with this Court's original habeas jurisdiction. Apart from its preclusion of certiorari, the Act is plainly intended to regulate only matters relating to the disposition of habeas applications in the lower federal courts. To read the Act as affecting this Court's jurisdiction by implication would contravene not only the Act's plain meaning but also settled doctrines basic to the structure of our government. This Court's indispensable role in establishing uniformity concerning the content of federal constitutional law has been long acknowledged. What is

[4] Questions (1) and (3) could be read expansively to reach beyond the implications of § 2244(b)(3)(E) for this Court's jurisdiction to examine the panel's judgment below. We understand the Court to be primarily concerned with that immediate issue. In this brief, prepared on an expedited schedule, we therefore confine our attention to the comparatively narrow (though extremely important) problems that the jurisdictional issue presents.

more, the Court has had an equally historic role in using "original" habeas as a method of ensuring that those confined in custody are held only in accordance with constitutionally valid rules and procedures. To leave the judgments of the courts of appeals unreviewable would compromise both functions, and it would be inconsistent with the reasoning of landmark cases in this Court.

Point II argues that the new statute presents no appreciable constitutional difficulties if read to leave the Court's habeas jurisdiction in place. (Questions as to the scope of the Court's exercise of that jurisdiction require further consideration.) If, however, the Act is read to bar all review by this Court of the decision below, it is unconstitutional. The Constitution must be read to make sense in all its parts and the grant to Congress of a power to shape exceptions to the appellate jurisdiction of the Supreme Court is not a license to destroy this Court's essential function in the constitutional plan. Whatever the ultimate scope of congressional power to regulate this Court's appellate jurisdiction, we submit that when an individual suffers a severe deprivation of liberty and asserts a claim that he is being confined pursuant to rulings and practices that violate the Constitution of the United States, such a claim cannot be wholly withdrawn from the cognizance of this Court.

Point III argues that the Habeas Corpus Suspension Clause supplies no independent basis for invalidating the application of the statute in this case, in view of the disposition by the court below. To argue that it does would require us to contend that Congress cannot provide for the initial consideration of successive petitions by three inferior federal judges rather than one. We make no such

contention. But the Suspension Clause adds weight to our construction of Article III. It strongly reinforces the special nature of the jurisdictional issues raised if there is an effort to cut off this Court's review of the legal claims of persons held in unconstitutional confinement.

The Court's jurisdiction to entertain Mr. Felker's prayer for a writ of habeas corpus under § 2241 of the Judicial Code is plain. The Court should accordingly permit him to show by further briefing that he is entitled to the exercise of that jurisdiction and to relief on the merits of his constitutional claims.

ARGUMENT

I. SECTION 2244(b)(3)(E) IS INAPPLICABLE TO HABEAS CORPUS PETITIONS FILED IN THIS COURT PURSUANT TO 28 U.S.C. § 2241.

Since the foundation of the Republic, this Court has possessed authority to issue "original" writs of habeas corpus. Judiciary Act of 1789, § 14, ch. XX, 1 Stat. 81-82. Like the Court's authority to issue writs of mandamus and prohibition, *e.g.*, *Ex parte Republic of Peru*, 318 U.S. 578 (1943), the writ is a method of *appellate* review, as numerous decisions of this Court recognize. *See, e.g., Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 102-03 (1869). *See also* Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 Sup. Ct. Rev. 153.[5]

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[5] *Cf. Ex parte Republic of Peru*, 318 U.S. at 585-86 n.4 (the Judiciary Act of 1925 left in place this Court's jurisdiction to issue extraordinary writs).

The Court's longstanding authority to issue "original" writs of habeas corpus is currently codified in 28 U.S.C. § 2241(a). The 1996 Act does not purport to affect that jurisdiction. Except for its bar to petitions for certiorari, the Act is plainly confined to regulating the disposition of successive habeas petitions in the lower federal courts. To read this statute as affecting by implication the Court's traditional § 2241 jurisdiction would be profoundly at variance with deeply embedded principles of statutory construction, and it would require rejecting the reasoning of this Court's landmark decisions in *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869).

A. Plain Meaning.

Prior to the 1996 enactment, second and successive petitions were filed initially in the district court. By its terms, the statute now requires that a prisoner move the court of appeals for authorization to file such a petition "in the district court." 28 U.S.C. § 2244(b)(3)(A). Subsection (b)(3)(B) requires a three-judge panel to rule on an application "authorizing the district court" to consider a second or successive application. And subsection (b)(4) directs that "[a] district court" shall dismiss petitions "unless the applicant shows that the claim satisfies the requirements of this section."

Except for its limitation on "writ[s] of certiorari," the Act makes no mention of this Court's jurisdiction.[6] With that sole exception, the text of the Act is expressly confined to adjusting the relationship between the courts of appeals and the district courts in cases of second and successive habeas petitions.[7]

Thus, by its plain meaning the Act affects the lower courts' jurisdiction but only the certiorari jurisdiction of this Court. And this straightforward reading of the statutory language makes good sense. The new Act achieves change without sweeping all of our traditions into the fire. On the one hand, it expedites the habeas process and addresses the important state interest in the finality of judgments.[8] A circuit panel screens petitions at the gate to forestall mistakes that district courts might otherwise make. The panel's decision on this threshold issue is

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[6] This Court ordinarily has statutory certiorari jurisdiction to review any and all cases in the circuit courts. 28 U.S.C. § 1254(1). Fairly read, the reference to "certiorari" in section 2244(b)(3)(E) means statutory certiorari under § 1254(1) and thus only purports to withdraw the appellate jurisdiction over certiorari petitions that § 1254(1) otherwise would confer.

[7] More than any other consideration, plain meaning controls statutory construction. *See, e.g., Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 474-75 (1992); *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990).

[8] *See, e.g.*, H.R. Rep. No. 23, 104th Cong., 1st Sess. 9 (1995) (stating that the original bill reported by the House Judiciary Committee was "designed . . . particularly to address the problem of delay and repetitive litigation in capital cases"); H.R. Conf. Rep. No. 518, 104th Cong., 2d Sess. 111 (1996) (bill "address[es] the acute problems of unnecessary delay and abuse in capital cases").

typically final: neither the prisoner nor the warden has recourse in the district court, in the full court of appeals sitting *en banc*, or in this Court on ordinary certiorari review. The statute simultaneously creates a strict screening mechanism and minimizes the litigation required to implement it. On the other hand, the Court's immemorial power to review plainly wrong refusals of habeas corpus relief on the basis of improper legal standards applied by lower federal courts remains undisturbed.

B. Precedents.

This is, however, more than just a plain meaning case. At stake is the appellate jurisdiction of this tribunal, the central judicial organ in our constitutional order. The Court has a long tradition against construing legislation so as to impair the traditional roles of any of the organs of government in our federal system.[9] That tradition is surely applicable here. In *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), this Court upheld its constitutional authority to review state court judgments rejecting claims

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[9] Statutes will not be deemed to have affected the sovereign immunity of the States unless the congressional intention to do so is unmistakable. *See, e.g., Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1123 (1996); *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989). Similarly, the Court has refused to find that the President could be subject to suit as an "agency" under the general provisions of the Administrative Procedure Act. *See, e.g., Dalton v. Specter*, 114 S. Ct. 1719, 1724-25 (1994). Moreover, the Court has been reluctant to assume that general congressional legislation was meant to regulate the inherent powers of the lower federal courts. *See, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991).

of federal right. The Court emphasized the need for its appellate jurisdiction based upon "the importance, and even the necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution." *Id.* at 347-48 (emphasis omitted). For this reason among others, the Court has consistently interpreted statutes that would preclude judicial review of executive and administrative action as not applying to claims of unconstitutional conduct. *Webster v. Doe*, 486 U.S. 592, 603 (1988) ("[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.")

This institutional imperative is intensified here by another consideration: the historic importance of habeas corpus. The writ is "aptly described as the 'highest safeguard of liberty.' " *Lonchar v. Thomas*, 116 S. Ct. 1293, 1298 (1996) (quoting *Smith v. Bennett*, 365 U.S. 708, 712 (1961)). Through habeas, this Court has for more than a century played an important role in protecting against unconstitutional deprivations of life and liberty. Any argument that the Act strips the Court entirely of its authority to examine in any way the claim of persons that they are being held in custody under rules, rulings, or practices that violate our fundamental law calls for the rejection of the Court's historic traditions. " '[T]here is no higher duty than to maintain [the writ of habeas corpus] unimpaired.' " *Johnson v. Avery*, 393 U.S. 483, 485 (1969) (quoting *Bowen v. Johnston*, 306 U.S. 19, 26 (1939)). That is a long entrenched view. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807).

No serious argument can be made that by negative implication § 2244(b)(3)(E) abrogates this Court's original

habeas jurisdiction, if this Court's landmark precedents are to be followed. The Court rejected any argument along those lines more than a century ago in both *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869).

In *McCardle*, the Court deferred to Congress' explicit repeal of the statute authorizing the habeas petitioner's appeal. Near the end of its opinion, however, the Court made clear that it could exercise jurisdiction in a future case on an alternative basis, not invoked in the case before the Court – namely, the predecessor to § 2241:

> Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.

McCardle, 74 U.S. at 515.

A year later, the Court squarely rested its decision in *Yerger* on the proposition it had stated in *McCardle*. The Court spoke in strong terms, stressing both the need for uniformity and the need to protect against unconstitutional deprivation of liberty:

> It is proper to add, that we are not aware of anything in any act of Congress, except the Act of 1868, which indicates any intention to withhold appellate jurisdiction in *habeas corpus* cases from this court, or to abridge the jurisdiction derived from the Constitution and defined by the act of 1789. We agree that it is given subject

> to exception and regulation by Congress; but it is too plain for argument that the denial to this court of appellate jurisdiction in this class of cases must greatly weaken the efficacy of the writ, deprive the citizen in many cases of its benefits, and seriously hinder the establishment of that uniformity in deciding upon questions of personal rights which can only be attained through appellate jurisdiction, exercised upon the decisions of courts of original jurisdiction. . . .
>
> These considerations forbid any construction giving to doubtful words the effect of withholding or abridging this jurisdiction. They would strongly persuade against the denial of the jurisdiction even were the reasons for affirming it less cogent than they are.

Yerger, 75 U.S. at 102-03.

We recognize that *McCardle* and *Yerger* were first petition cases. *See Lonchar v. Thomas*, 116 S. Ct. at 1299. But they are apposite here on the point of statutory construction. As *Lonchar* noted:

> Dismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty. See *Ex Parte Yerger*, 8 Wall. 85, 95 (1869) (the writ "has been for centuries esteemed the best and only sufficient defence of personal freedom"); *Withrow [v. Williams*, 507 U.S. 680, 700] (O'Connor, J., concurring in part and dissenting in part) (decisions involving limitation of habeas relief "warrant restraint"). Even in the context of "second and successive" petitions – which pose a greater

> threat to the State's interests in "finality" and are less likely to lead to the discovery of unconstitutional punishments – this Court has created careful rules for dismissal of petitions for abuse of the writ.

Id.

No basis exists for concluding that the Act, plainly read, affects this Court's historic authority to issue "original" writs of habeas corpus. As long ago as 1821, in Chief Justice Marshall's opinion in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), the Court required a clear statement before concluding that Congress intended to affect the Court's appellate jurisdiction. *Id.* at 379-80. Respect for that principle of construction is especially salutary here, in order to avoid the troublesome constitutional questions addressed in Part II below. *See, e.g., Webster v. Doe*, 486 U.S. at 603; *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974) (statutes should be interpreted so as to avoid constitutionally troublesome limitations on the jurisdiction of the federal courts). As the Court recently reaffirmed, the "doctrine requiring avoidance of constitutional questions . . . require[s] us always to apply the clear statement rule before we consider the constitutional question whether Congress has the power to . . . [act]." *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1131 n.15 (1996).[10]

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[10] Not only did Congress fail to state that the statute abrogated this Court's jurisdiction. Congress failed even to confront the possibility that the statute might be read in that unlikely way. Nothing in the legislative history of the 1996 Act indicates that the proponents either were aware of the problem this might entail or, if they were aware of it, that they informed their colleagues in the House and the Senate.

II. If The Act Wholly Eliminates This Court's Appellate Jurisdiction It Is Void.

No unconstitutional interference with this Court's appellate jurisdiction exists if Congress merely eliminates one procedure for review but leaves in place an equally efficacious alternative. *See, e.g., McCardle*, 74 U.S. at 515. So long as the Court's "original" jurisdiction to issue habeas remains in place, the elimination of certiorari jurisdiction presents no appreciable constitutional difficulties.

We say this, however, on the premise that the Court will subsequently examine the standards that should govern its review under § 2241 of court of appeals decisions in second and successive petition cases. The Court's preexisting practice, described in Sup. Ct. R. 20 4(a), has treated the entire subject of original habeas as exceptional and discretionary. *Ex parte Abernathy*, 320 U.S. 219, 220 (1943). Because the Court has premised that practice on the availability of other modes of review by and of the lower federal courts, it may not be apposite in the current context. *See, e.g., Dixon v. Thompson*, 429 U.S. 1080, 1080-81 (1977).[11] But the question the Court has posed for expedited briefing here concerns only "jurisdiction," not the standards for the exercise of acknowledged jurisdiction. *See Seminole Tribe of Florida*, 116 S. Ct. at 1130 (distinguishing between "substantive rules of law" and "jurisdiction"). Given the expressly "limited" nature of the questions posited, we do not address this question

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[11] The Court has authority to transfer original petitions to an appropriate lower federal court. 28 U.S.C. § 2241(b).

further. *See id.* at 1126 n.10; *Matsushita Electric Industrial Co. v. Epstein*, 116 S. Ct. 873, 880 n.5 (1996) (refusing to permit even respondents to expand the scope of the writ of certiorari).

If, however, one assumes that the 1996 Act eliminates both the habeas and certiorari jurisdictions of this Court in successive petition cases, then the question of congressional power to regulate the Court's appellate jurisdiction is directly drawn into question.

Relevant sources and materials are collected in Hart and Wechsler's *The Federal Courts and the Federal System* 365-70 (Richard H. Fallon et al. eds., 4th ed. 1996) ("Hart & Wechsler"). The available historical materials provide no real help. The exceptions clause[12] was added by the Committee of Detail but not discussed in the constitutional convention.[13] *See* Raoul Berger, *Congress and The Supreme Court* 285-96 (1969). One commentator has argued that the clause was designed to deal exclusively with appellate review of jury fact finding.[14] Another

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[12] *See* U.S. Const. art. III, § 2, cl. 2, ("the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with *such Exceptions, and under such Regulations as the Congress shall make*" (emphasis added)).

[13] "The important provision that the appellate jurisdiction should be subject to exceptions and regulations by Congress was contained in none of the plans. It is foreshadowed in Randolph's draft for the Committee of Detail and then appears in a later draft in Wilson's handwriting in substantially the form in which the committee reported it. There was no discussion in the Convention." Hart & Wechsler, *supra* at 180.

[14] Henry J. Merry, *Scope of Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 Minn. L. Rev. 53, 58-69 (1962).

insists that, closely analyzed, the drafting process discloses that the provision simply authorized congressional procedural rules for this Court's jurisdiction.[15] From the very beginning, however, legislation concerning the Court's appellate jurisdiction has never reflected such a limited conception of congressional authority.[16] Nor have this Court's cases.

In addition to constraints on Congress' power that are internal to Article III, it is quite apparent that provisions external to that Article, such as the Bill of Rights and the Fourteenth Amendment, preclude any concept of unlimited congressional power to regulate jurisdiction. Congress could not amend 28 U.S.C. § 1257, for example, to preclude petitions by persons of a certain nationality or race. William W. Van Alstyne, *A Critical Guide to Ex parte McCardle*, 15 Ariz. L. Rev. 228, 263 (1973). That having been said, however, the outer boundaries of congressional regulatory authority present complex and troublesome issues. *See United States v. Klein*, 80 U.S. (13 Wall.) 128, 144-47 (1871) (invalidating jurisdictional limitation on this Court's appellate authority).

Especially in situations such as this in which history cannot supply the entire answer, the Constitution must be

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[15] Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. Pa. L. Rev. 741, 779-86, 794-95 (1984).

[16] For a long period the Supreme Court did not have the full range of its potential appellate jurisdiction. State court decisions sustaining federal claims could not be reviewed until 1914 and appeals were not allowed in federal criminal cases. But the latter defect was only a matter of form, because the "original" writ of habeas corpus was used for that purpose.

read as a whole, so as to make sense of all its parts. And the "case . . . must be considered in light of our whole experience and not merely in that of what was said a hundred years ago." *Missouri v. Holland*, 252 U.S. 416, 433 (1920).[17]

This Court's cases have viewed the Constitution as essentially neutral about the existence of the "inferior" federal courts. But that is decidedly not the case with respect to this Court. The Constitution itself mandates the existence of "one supreme Court," U.S. Const. art. III, § 1, and provides for its jurisdiction, *id.* § 2, cl. 2. At the least, this means that the exceptions clause cannot be read so as to impair this Court's "essential role . . . in the constitutional plan."[18] Such a conception of the Court's authority

[17] This Court recently acknowledged the limitations of historical analysis. In *Markman v. Westview Instruments, Inc.*, 116 S. Ct. 1384, 1389-93 (1996), a unanimous Court found the historical evidence of the role of a jury in a patent cases inconclusive, and then proceeded to examine other sources including historical development. That approach applies equally here.

[18] Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1365 (1953). Responding to the claim that "the appellate jurisdiction of the Supreme Court is entirely within congressional control," Hart wrote:

> You read the *McCardle* case for all it might be worth rather than the least it has to be worth, don't you?
>
> • • •
>
> It's not impossible for me to lay down a measure. *The measure is simply that the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan. McCardle*, you will remember, meets that test. The circuit courts of the United States were still open in habeas corpus, and the Supreme Court itself could still entertain petitions for the writ which were filed with it in the first instance.

Id. at 1364-65 (emphasis supplied). Professor Hart's treatment of this issue is, of course, the classic one. Although others have proposed broader limitations on Congress' power, Hart's rule comes from the Court's cases, *see, e.g., Principality of Monaco v. Mississippi*, 292 U.S. 313, 328-29 (1934) (discussed *infra*), and is no broader than necessary to resolve this case.

must be taken as "inherent in the constitutional plan." *Principality of Monaco v. Mississippi*, 292 U.S. 313, 328-29 (1934). *See Seminole Tribe of Florida*, 116 S. Ct. at 1128 (" 'Behind the words of the constitutional provisions are postulates which limit and control.' " (quoting *Principality of Monaco*, 292 U.S. at 323)).

This standard assuredly contains a certain amount of indeterminacy, but as this Court's decision in *United States v. Lopez*, 115 S. Ct. 1624 (1995), makes plain, that quality is by no means an insuperable objection when what is at stake is the relationship of the central organs of our federal system. *See id.* at 1634. ("These are not precise formulations, and in the nature of things they cannot be.") The standard is, however, neither novel nor unique. It was, for example, the foundation of the Court's analysis in *Principality of Monaco*, explaining why state sovereign immunity was no bar to a suit by the United States, and in *Seminole Tribe of Florida*, explaining why the Eleventh Amendment did not exhaust the content of state sovereign immunity. Likewise when the Court concluded that Congress lacked the authority to commandeer state regulatory and legislative processes, *New York v. United States*, 505 U.S. 144, 176 (1992), it did so on the avowed

premise that any such congressional action would compromise the essential role of the states in the constitutional order. *Id.* at 167-69. The Court has been guided by a similar standard in ensuring that there be no interference with the essential role of the President. *See, e.g., United States v. Nixon*, 418 U.S. 683 (1974).

The indeterminacy concern is considerably avoided, moreover, because of the two historically critical features of the Court's constitutional function that are described in Point One: the crucial role of the "supreme Court" in the exposition of the meaning of the Constitution, and the Court's long entrenched function of determining whether constitutionally valid norms have been applied to persons deprived of their liberty.

If the Act were read to bar all review by this Court, it would offend both those principles. The Act would, in effect, establish not "inferior" federal courts but rather a multitude of three-circuit-judge "supreme Courts" in cases of successive petitions. This would impair the Court's authority to ensure uniformity in the construction of constitutional law. What is more, it would do so in a particularly sensitive area, one traditionally reached by the writ of habeas corpus, concerning persons who are in custody and who assert a claim that their confinement is the result of constitutionally invalid rulings or procedures.[19] We submit that when those two circumstances

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[19] *See, e.g., Harris v. Nelson*, 394 U.S. 286, 290-92 (1969) (citation omitted):

> The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action. Its pre-

coexist, Congress cannot eliminate the appellate jurisdiction of this Court. We need not go further and argue that if the complaint is that a government benefit has been unconstitutionally denied, this Court's appellate jurisdiction cannot be restricted. *See Webster v. Doe*, 486 U.S. 592, 603 (1988). But with respect to deprivations of liberty, we insist otherwise, and that claim extends to second petitions.[20]

Two successive petition cases recently reviewed by this Court, *Schlup v. Delo*, 115 S. Ct. 851 (1995), and *Sawyer v. Whitley*, 505 U.S. 333 (1992), show that such cases fall within this principle. They demonstrate the importance of the Court's role as the supreme expositor of the meaning

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> eminent role is recognized by the admonition in the Constitution that: 'The Privilege of the Writ of Habeas Corpus shall not be suspended. . . . ' The scope and flexibility of the writ – its capacity to reach all manner of illegal detention – its ability to cut through barriers of form and procedural mazes – have always been emphasized and jealously guarded by the courts and lawmakers. . . .
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> There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law.

[20] This is, however, not to deny that abuses of the writ can be regulated.

of the Constitution and its especial importance in determining whether valid norms have been applied in adjudicating the constitutional claims of individuals deprived of liberty.

Suppose that Schlup's case had arisen after the 1996 statute, so that, instead of affirming the dismissal of his second petition, a panel of the Court of Appeals of the Eighth Circuit had denied him leave to file it. If this Court lacked any jurisdiction to review that denial, Lloyd Schlup would be dead today, even though he had sufficiently pleaded then – and has successfully proven since – that he was "actually innocent" of the capital murder he was convicted of committing. He would be dead because the Court could not review the erroneous legal determinations of the court below.

Schlup had informed the Court of Appeals that the constitutional violation his successive petition challenged " 'probably resulted in the conviction of one who is actually innocent' " because "it [was] more likely than not that no reasonable juror would have convicted him in light of the . . . evidence" that the violation kept from the jury. *Schlup*, 115 S. Ct. at 867 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). Without disagreeing, the Eighth Circuit nonetheless dismissed the petition, concluding that the stiffer, "clear and convincing" standard of "actual innocence" in *Sawyer v. Whitley*, 505 U.S. 333 (1992), applied and that Schlup had not met it. *Schlup v. Delo*, 11 F.3d 738, 740-41 (8th Cir. 1993). This Court reversed, reaching three conclusions: (1) Because Schlup demonstrated his actual innocence, he had a right to file a second petition. *Schlup*, 115 S. Ct. at 869. (2) The court of appeals had misread the Court's decisions in *Carrier* and

Sawyer when it had applied the rule of the latter and not the former case. *Id.* at 865-67. (3) The court of appeals additionally had "erroneous[ly] appli[ed]" the *Sawyer* standard in a way that significantly undermined both the *Carrier* and the *Sawyer* standards. *Id.* at 867, 869. After extensive hearings on remand, the district court agreed that " 'it is more likely than not that no reasonable juror would have convicted [Schlup] in light of the [extensive eyewitness] evidence' " of his innocence that his constitutionally ineffective lawyer had failed to discover. *Schlup v. Delo*, 912 F. Supp. 448, 455 (E.D. Mo. 1995); see *Schlup v. Bowersox*, No. 4:92CV443 JCH, ___ F. Supp. ___, (E.D. Mo. May 2, 1996).

Recently, the Court held that forcing to trial a defendant who "is more likely than not incompetent" "offends a principle of justice . . . [so] deeply 'rooted in the traditions and conscience of our people' " that it violates Due Process. *Cooper v. Oklahoma*, 116 S. Ct. 1373, 1377, 1380 (1996) (quoting *Medina v. California*, 505 U.S. 437, 445 (1992)). Surely, if our most deeply rooted legal principles are offended by the mere "risk of an erroneous determination" of guilt that attends the trial of a man who "probably" cannot help competent counsel defend him, *id.* at 1381, they also are offended when it is "more probable than not" that an unconstitutionally incompetent lawyer has engineered the conviction and condemnation of a man who is "actually innocent." *See, e.g., Schlup*, 115 S. Ct. at 866 ("The quintessential miscarriage of justice is the execution of a person who is entirely innocent."); *Brecht v. Abrahamson*, 507 U.S. 619, 652 (1993) (O'Connor, J., dissenting) ("If there is a unifying theme to this Court's habeas jurisprudence, it is that the ultimate

equity on the prisoner's side – the possibility that an error may have caused the conviction of an actually innocent person – is sufficient by itself to permit plenary review of the prisoner's federal claim." (citing cases)). And just as surely, were Congress irrevocably to keep the Court from articulating principles of justice so deeply rooted as the precept that constitutional error should not result in sending innocent men to their deaths, the Court's "essential role" would be "destroy[ed]." Hart, *supra* note 18, at 1365.

Sawyer illustrates a different, but no less significant, way in which keeping the Court from considering denials of successive petitions would impair its constitutionally essential role. Before the grant of certiorari in *Sawyer*, the various courts of appeals had read this Court's precedents to compel widely divergent formulations for adapting the "actual innocence" test to capital-sentencing claims. *See Sawyer*, 505 U.S. at 343-44 & nn.10-11. The disparity in circuit court standards prompted this Court's grant of certiorari, and the difficult choice among those standards took up the bulk of its opinion. *Id.* at 343-47. Had Sawyer instead sought review after a court of appeals denied permission to file a successive petition, and had this Court's door been barred, the *potentially permanent* result would have been that condemned inmates were being denied leave to file habeas petitions in Mississippi, Louisiana and Texas that condemned inmates in Indiana, Arkansas, and Arizona were being granted leave to file. *Cf. Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816) ("If there were no revising authority [in the Supreme Court] to control . . . jarring and discordant [lower court] judgments, and harmonize

them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states. . . . The public mischiefs that would attend such a state of things would be truly deplorable.")[21]

It is instructive to consider the combined effect of these hypothesized results in light of the substantive standard that courts of appeals must apply to proffered successive petitions under the 1996 statute.[22] That standard is *Sawyer*'s standard, now applied to guilt-innocence claims instead of the capital-sentencing claims to which *Sawyer* applied it. Thus the courts of appeals will now be deciding whether or not a claim tendered by a successive habeas petition demonstrates "by clear and convincing evidence" that, "but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense"; and it is only in cases where a

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[21] Consider also the Court's grant of certiorari to review the denial of a successive petition in *Herrera v. Collins*, 506 U.S. 390 (1993). The Court granted certiorari to resolve an important question of *constitutional* law that had deeply split the circuit courts but that almost never arises except in habeas – and often *successive* habeas – cases. *Compare, e.g., Evans v. Muncy*, 916 F.2d 163, 166 (4th Cir.), *cert. denied*, 498 U.S. 927 (1990) (no constitutional right based on newly discovered evidence of innocence) *with, e.g., Sanders v. Sullivan*, 900 F.2d 601, 606-07 (2d Cir. 1990) (broad constitutional right based on newly discovered evidence of innocence).

[22] *See* 28 U.S.C. § 2244(b)(2)(B)(ii) (successive petitioner must show that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense").

court of appeals has arguably "misapplied"[23] this straitened standard that an occasion will arise for exercise of the Court's appellate jurisdiction to issue an original writ of habeas corpus in a successive-petition case. On the supposition that Congress has abrogated that jurisdiction and compelled the Court to sit by silently when such egregious miscarriages of justice on the one hand and inter-circuit disarrays on the other occur and persist, it is hardly doubtful that the Supreme Court of the United States has been shorn of power to fulfill its "essential role . . . in the constitutional plan."

III. The Suspension Clause Has No Independent Bearing On The Jurisdictional Issue Now Before The Court.

The third question posed for briefing by the Court's May 3 order is "Whether application of the Act in this case is a suspension of the writ of habeas corpus in violation of Art. I, § 9, clause 2 of the Constitution." The answer to that question is framed by the proceedings had below.

We do not believe that the Habeas Corpus Suspension Clause provides any basis for invalidating the "application of the Act in this case" independently of

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[23] *See Schlup*, 115 S. Ct. at 867-69. This paragraph assumes *arguendo* that the substantive standard of new subsection 2244(b)(2)(B)(ii) is constitutional. If that is so, its stringency heightens the injustices which would result from its misapplication; if it is not, that is because the injustices which flow from misapplications of the *Schlup* and *Sawyer* standards are themselves at the outer limits of constitutional tolerability.

Article III of the Constitution. Because of the way in which the 1996 statute was actually applied by the Eleventh Circuit panel below and remains available to be applied by this Court, a separate Suspension Clause argument would reduce to the claim that the Clause forbids Congress to route judgments of the merits of second-or-successive petitions to a three-judge panel of a Court of Appeals instead of to a single district judge in the first instance. We cannot conscientiously contend that it does. The Suspension Clause strongly reinforces what was said about Article III in Part II of this brief, but the Clause can bear upon the "application of the Act in this case" only in that manner and not as a distinct ground of constitutional invalidity.

The 24-page opinion delivered by the Court of Appeals in denying Mr. Felker leave to file a second habeas petition in the district court is the key to this conclusion. What the Court of Appeals did in that opinion was to examine each of the federal constitutional claims alleged in the proffered second petition and to hold, in the alternative, that (1) the claim was not cognizable in a second habeas petition either under the 1996 Act or under the less demanding standards for second-and-successive petitions that predated the statute – for reasons that were virtually identical under the two regimens – and (2) that the claim was substantively wrong on the record and the law. Thus, the only practical sense in which the 1996 Act was applied to the case by the Court of Appeals panel was that the form of proceeding in which the court announced these rulings was an application-for-leave-to-file-a-second-habeas-petition-in-the-district-court rather than an appeal from a district court

order denying relief or denying a stay of execution on a second habeas petition. In these circumstances – and with due regard for the Court's uniform practice of declining to issue advisory opinions on the Constitution and the limited scope of the briefing that it ordered on May 3 – the issue of the constitutionality of the "application of the Act in this case" becomes simply whether the Suspension Clause dictates that one instead of three judges rule upon the merits of a successive habeas petition at the outset.[24]

To be sure, the Court of Appeals decided the merits incorrectly. That is why the corrective appellate jurisdiction of this Court is necessary and should be exercised in the case, and that is why we have argued in Part II above that, if Congress implicitly and implausibly curtailed that appellate jurisdiction, the curtailment violates Article III. The Suspension Clause is a textual embodiment of the importance and historicity of the writ of habeas corpus and, in that light, bears upon the question whether an attempted abrogation of this Court's jurisdiction to review gross miscarriages of justice by a Court of Appeals' denial of habeas corpus relief would be consistent with the Court's Article III integrity.[25] But to analyze

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[24] While Petitioner continues to maintain that the circuit court violated rather than applied the Act, *see* letter from counsel of record to the deputy clerk of this Court dated May 2, 1996, this contention is not pertinent to the current questions presented.

[25] It is for this reason that in Parts I and II above we have adverted to this Court's repeated reading of the Suspension Clause as "testif[ying] to the importance of the writ of habeas corpus," *Kelly v. Robinson*, 479 U.S. 36, 48 n.9 (1986), and as recognizing that the jurisdiction conferred by 28 U.S.C. § 2241

such a question in terms of whether the 1996 Act "suspended" the privilege of the writ in Mr. Felker's case would distort both the question and the Suspension Clause beyond recognition.

CONCLUSION

The Court has jurisdiction. It should now permit the parties to address the issue of the proper exercise of that jurisdiction on the record of Mr. Felker's case. The questions to which the present brief were limited by the Court's order of May 3 do not address the standards that should govern original habeas petitions in cases where such petitions are the only remedy available to a condemned inmate in the courts of the United States, nor whether those standards encompass Mr. Felker's claims of constitutional error that have doomed him to die for a crime which he did not commit. He should be heard, and the Court should be fully advised on those subjects, while

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"implements the constitutional command that the writ . . . be made available," *Jones v. Cunningham*, 371 U.S. 236, 238 (1963). *See, e.g., supra* note 19.

the stay of execution which it granted on May 3 remains effective.

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